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IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-964.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

PAUL D. WARE,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE WRIT OF CERTIORARI.

Petition for Certiorari Filed January 28, 1972.
Certiorari Granted March 20, 1972.

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QUESTION PRESENTED.

Is there an independent and adequate state ground for the lower court's decision in *Pennsylvania v. Ware* where: (1) the decision of the Pennsylvania Supreme Court, when read as a whole, was clearly based upon what that Court deemed to be the constitutionally required "controlling and unambiguous" decision of this Court in *Johnson v. New Jersey*, 384 U. S. 719 (1966); (2) even if the lower court's decision were ambiguous in this respect, the present case is one where any supposed state ground, far from being "independent," is so interwoven with the federal constitutional ground that this Court has every reason to retain jurisdiction of this case; and (3) the question of the continuing vitality of *Miranda v. Arizona*, 384 U. S. 436 (1966), remains in the case since *Miranda* has never been adopted as a matter of state law in Pennsylvania?

ARGUMENT.

THERE IS NO INDEPENDENT AND ADEQUATE STATE GROUND FOR THE LOWER COURT'S DECISION IN PENNSYLVANIA v. WARE BECAUSE: (1) THE DECISION OF THE PENNSYLVANIA SUPREME COURT, WHEN READ AS A WHOLE, WAS CLEARLY BASED UPON WHAT THAT COURT DEEMED TO BE THE CONSTITUTIONALLY REQUIRED "CONTROLLING AND UNAMBIGUOUS" DECISION OF THIS COURT IN JOHNSON v. NEW JERSEY, 384 U. S. 719 (1966); (2) EVEN IF THE LOWER COURT'S DECISION WERE AMBIGUOUS IN THIS RESPECT, THE PRESENT CASE IS ONE WHERE ANY SUPPOSED STATE GROUND, FAR FROM BEING "INDEPENDENT," IS SO INTERWOVEN WITH THE FEDERAL CONSTITUTIONAL GROUND THAT THIS COURT HAS EVERY REASON TO RETAIN JURISDICTION OF THIS CASE; AND (3) THE QUESTION OF THE CONTINUING VITALITY OF MIRANDA v. ARIZONA, 384 U. S. 436 (1966), REMAINS IN THE CASE SINCE MIRANDA HAS NEVER BEEN ADOPTED AS A MATTER OF STATE LAW IN PENNSYLVANIA.

The Court has asked petitioner to "respond to respondent's point 4(b) that the decision of the Pennsylvania Supreme Court rests on an adequate, independent state ground."

As set forth in the Commonwealth's Petition for Writ of Certiorari, the Pennsylvania Supreme Court reversed the trial court's decision in this case because of what it considered the "controlling and unambiguous" decision of this Court in *Johnson v. New Jersey*, 384 U. S. 719 (1966). The Court stated: "We need not, however, respond to the Commonwealth's view as to what 'should be': to put it quite simply, the matter is no longer an open question." Com-

monwealth v. Ware, 446 Pa. 52 (1971). Indeed, the Court's holding was set forth in the very first paragraph of its opinion:

> The Commonwealth in this appeal calls upon this Court to hold the federal constitutional standards of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), inapplicable to a 1963 confession sought to be introduced in a post-*Miranda* trial. *This contention must be rejected. It ignores the controlling and unambiguous pronouncements of the United States Supreme Court concerning the extent of Miranda's retroactivity.* These pronouncements have been scrupulously followed not only by an unbroken line of decisions of this Court but also by virtually every other court in the nation which has dealt with the issue. (Footnotes omitted; emphasis supplied.)

Id. at 53. Then, after reciting the facts of this case, the Court began its discussion of the legal arguments as follows:

> The Commonwealth argues in defense of the trial court's suppression order that the standards of *Miranda* should not apply to a confession obtained prior to the date of that decision. *We need not, however, respond to the Commonwealth's view as to what "should be": to put it quite simply, the matter is no longer an open question.*
>
> In *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), the United States Supreme Court was squarely confronted with the question whether and to what extent *Miranda* should be accorded retroactive application. After carefully analyzing the material considerations, the Court concluded: "We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago." *Id.* at 721. 86 S. Ct. at 1775.
>
> *We cannot imagine how the Supreme Court could possibly have spoken more definitively.* That Court made it clear that the date of *trial* is the operative event, and that therefore the *Miranda* standards must be applied

to all post-*Miranda* trials, including those cases such as the present one involving pre-*Miranda* confessions. (Footnote omitted; emphasis supplied.)

Id. at 54-55. Nevertheless, because the Court then went on and said,

> This Court has not only faithfully honored the United States Supreme Court's clear directive, see *Commonwealth v. Davis*, 440 Pa. 123, 270 A. 2d 199 (1970); *Commonwealth v. Singleton*, 439 Pa. 185, 266 A. 2d 753 (1970); *Commonwealth v. Bennett*, 439 Pa. 34, 264 A. 2d 706 (1970); *Commonwealth v. Ware*, 438 Pa. 517, 265 A. 2d 464 (1969), cert. denied, 397 U. S. 925, 90 S. Ct. 918 (1970); *Commonwealth v. Williams*, 432 Pa. 557, 248 A. 2d 301 (1968); *Commonwealth v. Leaming*, 432 Pa. 326, 247 A. 2d 590 (1968); *Commonwealth v. Robinson*, 428 Pa. 458, 239 A. 2d 308 (1968); *Commonwealth v. Sites*, 427 Pa. 486, 235 A. 2d 387 (1967), but we adopt the *Johnson* position as a matter of state law. (Footnote omitted; emphasis supplied.)

(*Id.* at 55-56), respondent argues that there is an adequate and independent ground upon which the Pennsylvania Supreme Court based its decision. The Commonwealth respectfully submits that neither this language nor the later statement of the Court that "we are in agreement with the rationale of *Johnson*, and we affirm it as a matter of state law" (*id.* at 58) can be taken as the basis of the decision below since the Court demonstrated that it took this position only because it felt compelled to do so by this Court's decision in *Johnson*, *supra*. The Court was quite explicit in this connection:

> The Commonwealth would have us abandon the foregoing state and federal case law on the ground that the trial date language in *Johnson* was merely "ill-considered" and "inadvertent" dicta. We are unpersuaded.
>
> In the first place, *a state court is not free to ignore the dictates of the United States Supreme Court on federal constitutional matters* because of its own con-

clusion that those dictates are "ill-considered." Even if this or any other court should disagree with the views of the United States Supreme Court on a particular constitutional issue, *those views are binding*. See, e.g. *Commonwealth v. Williams*, 432 Pa. 557, 568 n. 8, 248 A. 2d 301, 307 n. 8 (1968).

In the second place, *we do not believe that the Supreme Court was speaking "inadvertently" when it stated five separate times in Johnson that Miranda should apply to all post-Miranda trials.* Any possible doubts in this regard should have been forever put to rest by the Supreme Court's subsequent decision in *Jenkins v. Delaware*, 395 U. S. 213, 89 S. Ct. 1677 (1969), which further clarified and explicitly reaffirmed the principles of *Johnson:* "[W]e could have . . . made the point of initial reliance, the moment the defendant is interrogated, the operative event. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial." *Id.* at 219, 89 S. Ct. at 1680-81.

Finally, we must reject the Commonwealth's claim that *Johnson* has been overruled *sub silentio* by the Supreme Court's more recent retroactivity cases fixing the date of the alleged constitutional violation rather than the date of trial as the operative cut-off date. There are of course "occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court of a conclusion inconsistent with an older Supreme Court case." *Rowe v. Peyton*, 383 F. 2d 709, 714 (4th Cir. 1967). But this is certainly not such a situation. *Johnson's* trial date rule has been reaffirmed by

> the Supreme Court as recently as April 5, 1971. See *Mackey v. United States*, 401 U. S. 667, 714, 91 S. Ct. 1160, 1164 (1971); *Williams v. United States*, 401 U. S. 646, 665 n. 7, 91 S. Ct. 1148, 1153 n. 7 (1971). Therefore, we are without constitutional authority to adopt a test for the retroactivity of *Miranda* which is inconsistent with *Johnson*. (Footnotes omitted; emphasis supplied.)

Id. at 56-58.

The Commonwealth in its brief before the Pennsylvania Supreme Court had argued that the *Johnson* "trial-date" rule was not constitutionally required. The Pennsylvania Supreme Court rejected this argument. The fact that the Court did so is a further indication that it felt bound by this Court's decision in *Johnson*.

Perhaps the clearest evidence that the Pennsylvania Supreme Court did not willingly adopt the *Johnson* test for setting a retroactivity date in the *Miranda* context is the fact that each and every member of that Court who had previously been faced with this issue had expressed extreme dissatisfaction with the "trial-date" rule:

> (1) Justice Roberts: *Commonwealth v. Schmidt*, 423 Pa. 432, 445 (1966) ("Since the essential rationale of [*Miranda*] seems to be deterrence of improper police practices I can see no sensible reason for making the trial date the determinative one. See *Linkletter v. Walker*, at 637, 85 S. Ct. at 1742. In my view the crucial date ought to be the date the confession was elicited and I would judge its admissibility according to the standards judicially announced at that time."); *Commonwealth v. Willman*, 434 Pa. 489, 491-92 (1969) ("It is not altogether clear * * * why *Johnson* utilized a date-of-trial test, rather than the date-of-occurrence test used subsequently in *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). It does seem, however, that the Court has wisely chosen in *Jenkins* to restrict to as great an extent as possible, within the limits of *Johnson*, the anomalous situation where the police are re-

quired to have given *Miranda* warnings before *Miranda* had been decided."); *Commonwealth v. Yount*, 435 Pa. 276, 279 (1969) ("The case before us illustrates the difficulty for the Commonwealth which *Johnson* can cause. Although appellant appears to have received almost all the warnings required by *Miranda*, he was not told that he was entitled to free counsel if he could not afford his own attorney. * * * Thus the Commonwealth failed to give all the warnings necessitated by *Miranda*, and this it was required to do even though *Miranda* had not yet been decided.")

(2) Justice O'Brien: *Commonwealth v. Willman*, *supra*, 434 Pa. at 495-96 ("... I would not have chosen the date-of-trial test utilized in *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), but would have selected the date-of-occurrence test of *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). * * * If the Court made a mistake in *Johnson*, as I believe it did, it should have said so, rather than seizing upon a distinction without a difference.")

(3) Justice Jones: *Commonwealth v. Yount*, *supra*, 435 Pa. at 281-82 ("With the utmost reluctance, I concur in the result reached by the majority of this Court. ... Under the compulsion of *Miranda* and only by reason thereof, I concur in the majority's result."); also *Commonwealth v. Willman*, *supra*.

(4) Justice Eagen: *Commonwealth v. Robinson*, 428 Pa. 458, 460 n. 1 (1968) ("Ironically, the crime involved occurred on September 3, 1965, and if Robinson's trial had commenced prior to June 13, 1966, the date of the *Miranda* decision, the evidentiary use of the confession would not be constitutionally proscribed since all of the warnings of the constitutional rights required by *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964), were given."); also *Commonwealth v. Yount*, *supra*.[1]

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[1] Other than the above four Justices, only one other member of the Court, Mr. Justice Barbieri, took part in consideration of this case. Justice Barbieri, a recent member of the Court, had never previously

Thus, respondent's suggestion that the Pennsylvania Supreme Court willingly adopted the "rationale" of *Johnson*[2] when it said, "We need not, however, respond to the Commonwealth's views as to what 'should be': to put it quite simply the matter is no longer an open question" (*id.* at 55) is not well taken. The Court decided the case in the first paragraph of its opinion and did so only on the basis of what it believed to be the "controlling and unambiguous pronouncements of the United States Supreme Court concerning the extent of *Miranda's* retroactivity." *Id.* at 53. Furthermore, when the Pennsylvania Supreme Court's opinion is read as a whole it is clear that the "adoption" of *Johnson* as a matter of state law was done under what that Court deemed the compulsion of the United States Constitution.

In any event, even if the Pennsylvania Supreme Court's decision were ambiguous in this respect, the present case is one where any supposed state ground, far from being independent, is so interwoven with the federal constitutional ground that this Court is entitled to retain jurisdiction in this case. In *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939), state and federal grounds were used "alternatively" as a basis for the state court's decision, the state court's opinion referring not "only incidentally" to decisions of the United States Supreme Court. *Id.* at 514. This Court held that in such a case the "two grounds are so interwoven" that it could not find an independent state ground for the decision. *Id.* See also *Standard Oil of California v. Johnson*, 316 U. S. 481, 483 (1942) ("If the court's construction of [the state statute] had been based purely on local

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expressed an opinion on this issue. Then Chief Justice Bell and Justice Pomeroy did not participate in the consideration or decision of the case.

[2] The Pennsylvania Supreme Court did not even purport to suggest a "rationale" for the **Johnson** "trial-date" rule, the Court relying instead on what it deemed the controlling reaffirmation of **Johnson** in **Jenkins v. Delaware**, 395 U. S. 213 (1969).

law, this construction would have been conclusive. . . . But . . . the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning [an issue] which is controlled by federal law. . . . Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct"); *Patterson v. Alabama*, 294 U. S. 600 (1925) (despite the existence of a technically adequate and independent state ground for decision, this Court vacated the judgment and remanded the case to the state court where this Court was "not satisfied that the [state] court would have dealt with the case in the same way if it had determined the constitutional question as we have determined it"); and *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 443 (1952) ("for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so."). Also cf. Wright, *Law of Federal Courts* (2d ed. 1970), p. 489 ("A new state rule cannot be invented for the occasion in order to defeat the federal claim"); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 456-58 (1958).

Finally, in the court below the Commonwealth contended that the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §3501(b), had overruled the *Miranda* decision to the extent that *Miranda* was interpreted as mandating the inadmissibility of confessions obtained without the giving of detailed warnings where the confessions were voluntary within the meaning of the Act.[3] The Com-

[3] This issue was raised by both parties in the Court below (see Appendices A and B attached hereto). This was the only other issue raised aside from the retroactivity cutoff date question, there being no challenge to the voluntariness of the confessions. Nor did a majority of the Pennsylvania Supreme Court even discuss the issue of whether the interlocutory order initially entered which was later withdrawn after the nol pros was removed barred the use of defendant's confessions. The Commonwealth's basic position in the trial court was that what had happened, in essence, was that: (1) the court initially granted the motion to suppress solely on the ground that **Johnson**

monwealth's brief in the Pennsylvania Supreme Court on this issue is set forth as Appendix B hereto.

Since *Miranda* has never been adopted as a matter of state law in Pennsylvania, this second issue, which has been raised and preserved in all the lower courts and was necessarily rejected by implication by the Pennsylvania Supreme Court, is clearly another federal constitutional question involved in this case which is now ripe for decision by this Court. There is also no adequate and independent state ground on this second issue. Indeed, respondent does not even suggest the contrary.

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controlled; (2) a nolle prosequi was entered **with defendant's consent:** and (3) later cases had the same effect as if **Johnson** had been explicitly overruled such that the Commonwealth now was entitled to move to trial and use the confessions. This position prevailed in the lower courts (see Appendices A and B of the "Petition") and was not even challenged by respondent on his appeal to the Pennsylvania Supreme Court. Though one Justice of the Court raised the nol pros issue, the majority opinion dealt directly with the federal constitutional issue.

CONCLUSION.

Wherefore, the Commonwealth respectfully requests that this Court continue to sustain its granting of the Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District.

No. 247, January Term, 1971.

COMMONWEALTH OF PENNSYLVANIA
v.
PAUL D. WARE, *Appellant.*

BRIEF FOR APPELLANT.
(In Forma Pauperis)
and
OPINION OF COURT BELOW.

Appeal From the Order of the Court of Common Pleas of Philadelphia County Trial Division, Criminal Section, at Nos. 328, 343, 345, 349, of December Term, 1963.

J. CHARLES SHORT,
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Attorney for Appellant.

[Index to Brief deleted.]

STATEMENT OF JURISDICTION.

This appeal arises on a Special Writ Of Certiorari to the Court of Common Pleas Trial Division, Criminal Section, for the County of Philadelphia, Pennsylvania. On December 2, 1970 defendant filed a Petition with your Honorable Court under Section 501(b) of the Pennsylvania Appellate Court Jurisdiction Act of 1970, P. L. ——, No. 223, 17 P. S. §211.501(b), for leave to file an appeal from an Interlocutory Order of the Court below, dismissing an Application to Suppress Pre-*Miranda* confessions.

On January 6, 1971, the following Order was entered by Your Honorable Court:

"January 6, 1971.
Petition granted.
s/ Roberts and Pomeroy, JJ."

Thereafter, on April 7, 1971 a Per Curiam Order issued permitting Appellant to proceed In Forma Pauperis.

STATEMENT OF QUESTION INVOLVED.

1. Where confessions were made before the *Miranda* decision is their admissibility to be determined under *Miranda* rules where trial will commence substantially beyond the effective date of the *Miranda* decision due to defendant's intervening mental incapacity?

(Answered in the negative in the Court below.)

HISTORY OF THE CASE.

Paul D. Ware, defendant, by special allowance of your Honorable Court, appeals the November 13, 1970, Order by Honorable Robert N. C. Nix, Jr., of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, denying defendant's Application To Suppress statements obtained from him allegedly in violation of the rules in *Miranda v. State of Arizona*, 384 U. S. 436, S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Following his arrest on September 27, 1963, in connection with a burglary, defendant on October 3, 1963, in the course of custodial interrogation, gave oral and written statements implicating himself in four separate murders. He was indicted on four homicide charges by the December, 1963 Grand Jury. However, on December 12, 1963 defendant was declared incompetent to stand trial and was committed to Farview State Hospital where he remained from January 6, 1964 until July 19, 1967.

Court appointed counsel for defendant in October, 1967, moved to suppress the statements made on October 3, 1963, on the ground that they were obtained in violation of the *Miranda* rules. On May 23, 1968 the Honorable Robert N. C. Nix, Jr., pursuant to the agreement of counsel that the statements were elicited in violation of *Miranda* standards, entered an Order of Suppression.

Thereafter, on December 12, 1968, at the request of the Commonwealth, the Honorable D. Donald Jamieson entered a nolle prosequi of the four murder bills in question for the reason that, without defendant's statements, the Commonwealth could not prove its case. Defendant offered no objection.

Approximately eight months later, on August 11, 1969, the District Attorney petitioned for the removal of the nolle prosequi on the bills of indictment, contending in essence that the law was now such that the defendant's confessions should not be suppressed. On December 11, 1969, the Hon.

D. Donald Jamieson granted the Commonwealth's Motion to remove the nolle prosequi previously entered on the four homicide bills of indictment.

Thereafter, on June 19, 1970 Judge Nix vacated the Order of Court entered May 23, 1968 and ordered a Suppression Hearing. On November 13, 1970 the Court made an order directing that defendant's Application to Suppress his written and oral statements be denied. In the Opinion accompanying said Order the learned trial Judge holds that *Miranda* is not applicable to the instant case, but does not discuss prior decisions of your Honorable Court holding that *Miranda* does apply to cases brought to trial after June 13, 1966. The Opinion expresses concern for the complete frustration of law enforcement officials who elicit incriminating statements relying on the law then existent.

On the joint petition of defense and Commonwealth counsel, on December 1, 1970 the Court supplemented and amended its Order of November 13, 1970 by adding thereto that in the opinion of the Court such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

SUMMARY OF ARGUMENT.

Appellant contends with respect to the pre-*Miranda* confessions involved, that the learned Trial Judge disregarded clear and authoritative pronouncements by your Honorable Court, based upon *Johnson v. New Jersey*, fixing the date-of-trial test as the rule for cases coming to trial after June 13, 1966. *Jenkins v. Delaware* and *Commonwealth v. Willman* reaffirm that rule and do not open the door for carving out exceptions in cases of delay in coming to trial.

Both the United States Supreme Court and your Honorable Court have recognized that the date-of-

trial test could produce some resultant inequities. The Commonwealth originally accepted the *Miranda* test in this case, then did an about face, asserting that there is now a basis for restricting the application of *Miranda* where the Commonwealth is not to blame for delay in bringing a mentally incompetent defendant to trial. One of the Commonwealth's points in its petition to remove the nolle prosequi was the adoption of the federal Omnibus Crime Control and Safe Streets Act which has been held not applicable to our state courts.

The decisional law does not support the reasoning of the learned Trial Judge that there are no controlling or compelling appellate decisions on point and that the suppression of confession issue in this case should be decided by reference to the "general philosophy" of the United States Supreme Court.

Appellant contends further that the learned Trial Judge incorrectly made voluntariness the primary test instead of applying the failure to give *Miranda* warnings to the defendant as the test clearly required by the decisions of your Honorable Court, both on the law and the facts of the case.

On the whole the learned Trial Judge resorted to a strained interpretation and application which simply cannot be reconciled with the clear rulings of your Honorable Court.

ARGUMENT.

1.

Introduction.

The effect of the lower Court's decision, if allowed to stand, will be to open the door for exceptions to the already clearly announced rule of Your Honorable Court, that *Miranda* warnings are required in all cases brought to

initial trial after June 13, 1966. In the teeth of such rule the learned trial Judge finds an exception which he considers supported by reference to the "general philosophy" of the United States Supreme Court. At page 25 of his Opinion, the learned Trial Judge states that "We feel compelled from the logic of *Johnson* and *Jenkins* to conclude that the philosophy of those decisions is incompatible with the result urged here by the defense".

The lower Court's opinion makes no reference to the decisions of your own Honorable Court on the precise point that where a defendant's trial takes place after *Miranda* the admissibility of his confession is to be determined under *Miranda* rules. Basically, the instant case boils down to a consideration of what the well established law is, rather than what the trial judge would like it to be. This argument will show that the Honorable Judge Nix failed to follow well established Pennsylvania cases and also incorrectly distinguished the decisions of the United States Supreme Court. Both Courts were well aware of certain inconveniences for prosecutors when they balanced the constitutional safeguards involved and adopted the date-of-trial test.

2.

Miranda Rules Apply To Cases Coming To Trial After June 13, 1966.

It has always been clear under *Johnson v. New Jersey*, 384 U. S. 719 (1966), and the decisions of the Pennsylvania Supreme Court, that *Miranda* rules apply to *pre-Miranda* confessions in cases where the trial begins after June 13, 1966, the date of the decision in *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). Clear pronouncements by your Honorable Court leave no room for doubt on this score.

A.

Miranda Warnings Are Required Even Though Miranda Had Not Yet Been Decided.

Commonwealth v. Yount, 435 Pa. 276 (1969).
Commonwealth v. Marvin Ware, 438 Pa. 517 (1970).
Commonwealth v. Davis, 440 Pa. 123 (1970).

In *Commonwealth v. Yount, supra*, the confessions were given on April 29, 1966. Before trial, defendant moved to suppress the confessions as violative of *Miranda v. Arizona, supra*. The motion was denied and trial commenced September 28, 1966, with the confessions being admitted over defendant's objection. Your Honorable Court reversed with a Concurring Opinion by Mr. Justice Jones and a Dissenting Opinion by Mr. Chief Justice Bell. The Opinion for the majority by Mr. Justice Roberts states at page 279:

> "Although appellant's confessions came before the decision in *Miranda*, since appellant's trial took place after *Miranda*, the admissibility of the confessions is determined under the *Miranda* rules. *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966). The case before us illustrates the difficulty for the Commonwealth which *Johnson* can cause. Although appellant appears to have received almost all the warnings required by *Miranda*, he was not told that he was entitled to free counsel if he could not afford his own attorney. See e.g., *Commonwealth v. Dixon and Kontos*, 432 Pa. 423, 248 A. 2nd 231 (1968). Thus the Commonwealth failed to give all the warnings necessitated by *Miranda*, and this it was required to do even though *Miranda* had not yet been decided."

In *Commonwealth v. Marvin Ware, supra,* the confession was given in January, 1966. The case came to trial after June 13, 1966. The Opinion by Mr. Justice Roberts, at page 519, states that: "The admissibility of the instant confessions is controlled by *Miranda v. Arizona.*" Mr. Chief Justice Bell and Mr. Justice Jones dissented.

In *Commonwealth v. Davis, supra,* which was tried before the Honorable Judge Robert N. C. Nix, Jr., the defendant while in police custody made an incriminating statement on April 4, 1966. A Per Curiam Opinion, dated October 9, 1970, states at page 125: "The trial occurred subsequent to the effective date of *Miranda v. Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966), and hence, unless Davis was fully informed of his constitutional rights before the questioning commenced as *Miranda* requires, evidentiary use of the statement violated due process. *Johnson v. New Jersey,* 384 U. S. 719, 86 S. Ct. 1772 (1966). Judgment was reversed and a new trial ordered. Mr. Chief Justice Bell and Mr. Justice Jones dissented.

B.

The Rule That the Commencement of Trial is Determinative is Reaffirmed by Jenkins v. Delaware.

Jenkins v. Delaware, 395 U. S. 213 (1969).

The question of whether *Johnson v. New Jersey, supra,* applied to the post-*Miranda retrial* of a *pre-Miranda* defendant was laid to rest in *Jenkins v. Delaware, supra.* Actually the case deals with the time of "commencement" of a trial which occurred before the *Miranda* ruling. It is difficult to see how this decision on *retrials* can aid the Commonwealth in the instant Paul Ware case. Although the Opinion by Mr. Chief Justice Warren, speaking for the majority, recognized the difficulties facing a prosecutor

where an investigation was closed years prior to retrial, the ruling reaffirmed *Miranda*, supra, and *Johnson v. New Jersey*, supra. The Opinion by Mr. Chief Justice Warren at page 219 states:

> "In *Johnson;* after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitutional standards then applicable. See *Linkletter v. Walker,* 381 U. S. 618 (1965). As we pointed out, however, that choice 'would (have) impose(d) an unjustifiable burden on the administration of justice.' 384 U. S., at 733. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See *Schaefer, supra,* at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. . . ."

Although the United States Supreme Court could have adopted some other test, the fact remains that it did adopt the date-of-trial test. In *Commonwealth v. Willman,* 434 Pa. 489 (1969), an appellant contended that although his first trial took place before *Miranda*, his re-trial took place after *Miranda* and thus in the second trial, the *Miranda* rules apply. The majority Opinion by Mr. Justice Roberts states at pages 491, 492:

> "Appellant's contention has recently been rejected by the Supreme Court of the United States as a result compelled by the Constitution of the United States as interpreted in *Johnson v. New Jersey,* 384 U. S. 719, 86 S. Ct. 1772 (1966), the case which delineated the

extent to which *Miranda* would apply. See *Jenkins v. Delaware*, 395 U. S. 213, 37 L. W. 4458 (1969). Although both *Johnson* and *Jenkins* permit us, as a matter of state law, to apply *Miranda* more broadly than would the Supreme Court of the United States we choose not to do so.

The opinion in *Jenkins* indicates that the Court in *Johnson* was attempting to strike a balance between the need for even-handed administration of justice and administrative burden placed on the law enforcement system by retroactive application. It is not altogether clear, even in light of this, why *Johnson* utilized a date-of-trial test, rather than the date-of-occurrence test used subsequently in *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). It does seem, however, that the Court has wisely chosen in *Jenkins* to restrict to as great an extent as possible, *within the limits of Johnson*, the anomalous situation where the police are required to have given *Miranda* warnings before *Miranda* had been decided. Since the requirements of *Miranda* do not go to the validity of the guilt-determining process, it seems fair in striking the balance between individual rights and the administration of criminal justice to limit the retroactive application of the case. See generally Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965). This is especially true since the voluntariness test, considering the absence of *Miranda* warnings as a relevant factor, still provides a mechanism to guard against the infringement of individual liberties. See Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 326-27 (1967)." (Emphasis added.)

In a Concurring and Dissenting Opinion Mr. Justice O'Brien states, at page 495, that as a matter of state law he would not have chosen the date-of-trial test utilized in

Johnson v. New Jersey, but would have selected the date-of-occurrence test of *Stovall v. Denno.* At page 496 Mr. Justice O'Brien says that *Miranda* "sets forth the law of the land, and we must follow it, but we are not required to sing its praises".

The United States Supreme Court recognized that there might be some resultant inequities in the application of the test which it had formulated. In Jenkins, it was further said at pages 217, 218:

> "In short, petitioner's concern for what he refers to as 'visible imperfection (s) in a judicial process' merely highlights the problem inherent in prospective decision-making, i.e., some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the specter of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of newly formulated constitutional principle."

C.

Difficulty in Obtaining Evidentiary Substitutes Should Not Be a Controlling Factor in This Case.

The Commonwealth was aware of the difficulty confronting it with respect to obtaining evidentiary substitutes when it agreed to the Suppression Order of May 23, 1968. On August 12, 1969 the Commonwealth petitioned to reopen the suppression because it believed, in large measure, that the federal Omnibus Crime Control and Safe Streets Act effective June 19, 1968, had, in effect, overruled

Miranda. And the Commonwealth's Petition to Reopen alleged that as a matter of federal constitutional law, there cannot be more restrictive standards on states, based on the requirements of the United States Constitution, than those applicable to federal law enforcement officers and trial in federal courts (Paragraphs 10-14).

In *Commonwealth v. Bennett*, 439 Pa. 34 (1970), your Honorable Court rejected a Commonwealth contention in that case that the *Omnibus Act, supra*, should be applied in determining the admissibility of defendant Bennett's admissions and confession. However, the trial in that case had been concluded before the said federal enactment became effective.

In *Commonwealth v. Marvin Ware*, 438 Pa. 517, decided May 27, 1970, your Honorable Court held that the said *Omnibus Act* is not applicable in State courts.

In his Opinion of June 19, 1970 accompanying the Order vacating the Suppression Order of May 23, 1968 and directing a Suppression Hearing, his Honor, Judge Nix stated that the Commonwealth's contention that the *Miranda* decision had been significantly modified by the *Omnibus Crime Control and Safe Street Act*, P. L. 90-351. Title II, 82 Stat. 210, 18 U. S. C. Sec. 3501 had been rejected by the Pennsylvania Supreme Court in *Commonwealth v. Bennett, supra*. However, the Court went on to recognize as a "contention with substance justifying the exercise of discretion to permit the Commonwealth to elicit additional testimony", the Commonwealth's contention that where statements were elicited prior to the *Miranda* decision, supra, and trial was delayed by virtue of the incapacity of the defendant until after June 13, 1966, the defendant should not derive the benefit from this delay" (page 5).

The subsequent opinion of November 13, 1970 strains and labors to reach a result favorable to the Commonwealth's contention. In stating the questions involved, the lower Court directs itself first to whether the incriminatory statements made by defendant during custodial interroga-

tion were voluntary, and only secondly, considers whether the statements must be suppressed because of the failure to give the *Miranda* warnings (page 2). However, in his discussion the learned trial Judge concedes that "at no time was Ware effectively warned of his constitutional rights" (page 15) and that "Miranda warnings were not given during the various interrogations which occurred nearly three years prior to that landmark decision". (page 16). The Court then went on to state that "Having determined the statements of this defendant during custodial interrogation to have been voluntary it is now incumbent upon us to determine the applicability of *Miranda v. Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (page 18).

Without referring to the decisions of Your Honorable Court applying the *Miranda* rules to cases coming to trial after June 13, 1966, Judge Nix reasoned that neither *Jenkins* nor *Johnson* passed upon the applicability of *Miranda* to trials where delay has resulted in removing the possibility of obtaining substitute evidence and its application would completely frustrate the attempt to prosecute the felon (page 23).

The trial judge reasoned that the United States Supreme Court had not weighed all of the distortions that might result from the selection of the trial as the operative date (page 23). He then went on to state that "There being no U. S. Supreme Court pronouncement on the subject and from our investigation no other controlling or compelling appellate decisions on point, we must now decide the cause attempting to find direction from the general philosophy the Supreme Court has provided in this area" (page 24).

We respectfully submit that the learned lower Court has not applied the case law, particularly the decisions of your Honorable Court, as it is, but as the trial judge and probably many others would like to see it be. However, if a trial judge can carve out this exception he can carve out another exception in another case and the established rule that the date-of-trial governs the application of *Miranda*

tests will have lost all significance. There will cease to be an ascertainable rule.

3.

Miranda Rules Require Minimum Basic Constitutional Safeguards.

In *Commonwealth v. Yount, supra,* the majority opinion states, at pages 279, 280:

> "The Commonwealth attempts to get out of the corner into which it apparently has been painted by arguing that appellant's confession was 'voluntary'. But although appellant's confession was certainly voluntary in the *Davis v. North Carolina,* 384 U. S. 737, 86 S. Ct. 1761 (1966) sense, it was not *volunteered* as required by *Miranda*".

A warning that a statement could be used for the defendant at trial was held to be an impermissible inducement in *Commonwealth v. Singleton,* 439 Pa. 185 (1970).

In *Commonwealth v. Bennett, supra,* your Honorable Court ruled "that, under the circumstances, it was absolutely essential before the questioning began during the polygraph test, that Bennett be given a full warning of his constitutional rights . . ." (page 38).

The proper course for the learned Trial Judge to have followed in the instant Paul Ware case would have been first to determine whether *Miranda* applied or not. Then if he ruled that *Miranda* did not apply he could have proceeded to evaluate appellant's confessions under the post-Miranda voluntariness test: Cf. *Commonwealth v. Willman, supra.*

4.

Conclusion.

It is respectfully submitted that the Order of the lower court denying defendant's Application to Suppress statements and confessions obtained from him during the course of custodial interrogation cannot be reconciled with the clear pronouncements of your Honorable Court. The lower court's order should be reversed and the *Miranda* rules held applicable to this case which has not yet come to trial.

Respectfully submitted,

J. CHARLES SHORT,
(Appointed) Attorney for Appellant,
Paul D. Ware.

DOCKET ENTRIES.

IN THE COURT OF COMMON PLEAS
TRIAL DIVISION—CRIMINAL SECTION
COUNTY OF PHILADELPHIA.

COMMONWEALTH	December 1963.
VS.	328—MURDER.
PAUL WARE.	343—MURDER.
	345—MURDER.
	349—MURDER.

Oct. 11, 1963 Order—Neuro-Psychiatric Examination requested by District Attorney. Order Granted. Sporkin, J.

April 16, 1968 Petition to Suppress Filed.

May 23, 1968 Petition to Suppress Granted. Nix, J.

Dec. 12, 1968 Court Room 253. Presiding Hon. Donald Jamieson. A Nolle Prosequi is entered as to all Bills. Jamieson, J.

Aug. 12, 1969 Commonwealth Petition to remove Nolle Prosequi and reopen hearing on Motion to Suppress Filed.

Dec. 11, 1969 Commonwealth's Motion to remove Nolle Prosequi on all Bills is hereby granted. Jamieson, J.

June 19, 1970 Order: The Order of the Court entered on 5/23/68 is hereby vacated. It is further ordered that a Suppression Hearing be held June 25, 1970. Leave is granted to Defendant to Amend their Petition. Opinion Filed. Nix, J.

Nov. 13, 1970 Order—It is Ordered and Decreed that the Defendant's Motion to Suppress Written and Oral Statements is Denied. Opinion Filed. Nix, J.

Dec. 2, 1970 Joint Petition for Suppression Order Filed, Eo Die: Supplemental Order. Upon the Joint Petition of the Defendant and District Attorney it is Ordered and Decreed that the Order filed on 11/13/70 Be and the same is hereby Supplemented and Amended by adding thereto that: in the Opinion of the Court, such Order involves a controlling question of Law, as to which there is substantial ground for difference of opinion and that an immediate Appeal from the Order may advance the ultimate termination of this matter. Nix, J.

June 14, 1970 Certiorari from the Supreme Court filed, Returnable the 3rd Monday of April, 1971.

[The Opinion of the trial court has been deleted from this Appendix.]

APPENDIX B.*

AS A RESULT OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, DEFENDANT'S CLEARLY VOLUNTARY CONFESSION IS PROPERLY ADMISSIBLE AT HIS TRIAL.

The Supreme Court of the United States in *Miranda v. Arizona,* 384 U. S. 436 (1966), ruled that no confession could be introduced into evidence at any trial unless detailed warnings were given and waivers obtained in accordance with that decision.

The Omnibus Crime Control and Safe Streets Act, passed by the Congress, signed by the President, and effective on June 19, 1968, revised the standards for the admissibility of confessions in Federal Courts, so that a confession can be introduced into evidence if it is voluntarily given considering all the surrounding facts. P. L. 90-351, Title II, 82 Stat. 210, 18 U. S. C. §3501:

> ADMISSIBILITY OF CONFESSION.
>
> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

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* The following argument is that made by the petitioner in their brief in the Court below.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

This law in effect overrules *Miranda* in permitting the introduction into evidence of clearly voluntary statements made by an accused during custodial interrogation without the detailed warnings and waivers. It is in basic harmony with the Fifth Amendment, which states that: "nor shall [any] [person] be compelled in any criminal case to be a witness against himself."

This Court has refused to apply the 1968 Congressional legislation because it "relates only to a 'criminal prosecution brought by the United States or by the District of Columbia' ". Moreover, the trial in the instant case was concluded before the enactment became effective." *Commonwealth v. Bennett*, 439 Pa. 34, 39 (1970). But the case now before this Court has not yet been tried. And though the 1968 Congressional enactment by its terms applies to federal, not state, prosecutions, the fact is that the legisla-

tion expresses the clear idea that *Miranda*, in terms of the explicit requirements there set forth, is not Constitutionally binding.

The *Miranda* opinion itself stated: ". . . [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted". [384 U. S. at 467.] It has also now become clear that the particular solution suggested in *Miranda* has not won national acceptance (see footnote 10, supra).

Title II of the Omnibus Crime Control and Safe Streets Act constitutes a statement of national public policy that confessions should be admissible into evidence without the detailed *Miranda* warnings and waivers. As a matter of federal constitutional law, there cannot be more restrictive standards on states, based on the requirements of the United States Constitution, than those applicable to federal law enforcement officers and to trial in federal courts. See *Bolling v. Sharpe*, 347 U. S. 497 (1954).

The Omnibus Crime Control and Safe Streets Act was passed after extensive congressional hearings which contained testimony, statistics, and other data showing the unduly restrictive effects on law enforcement officers resulting from the *Miranda* decision:

> Statistical evidence further indicates the harmful effects of the *Miranda* decision. During the subcommittee hearings, Arlen Specter, district attorney of the City of Philadelphia, revealed a study on the effects of *Miranda* conducted by his office. The results indicated that prior to the *Escobedo* case, 90 percent of the suspects would make a statement, often not incriminating on their face, but valuable in investigating the crime. After *Escobedo*, only 80 percent would give statements. After the second circuit *Russo* case, only 68 percent of suspects would give statements. Then came the *Miranda* case in June 1966. For a period after *Miranda*, out of 5,220 suspects arrested for serious crimes, 3,095 refused to give a statement. This is a

percentage of only 41 percent who would give statements; a decrease of 49 percent since *Escobedo*. These statistics are inclined to become more alarming as more criminals become more familiar with *Miranda*.

Aaron Koota, district attorney for Kings County, N. Y., conducted a similar survey, indicating that prior to *Miranda*, approximately 10 percent of the suspects involved in serious crimes refused to make statements or confessions to police. After *Miranda*, 41 percent refused to make statements or confessions. Specifically, between June and September of 1966, Mr. Koota revealed that 130 of 316 suspects refused to make any statement at all. In only 30 of these 130 cases did Mr. Koota have sufficient evidence to prosecute apart from the confession. Mr. Koota was unequivocal in stating that confessions are helpful in securing convictions.

Charles E. Moylan, Jr., State's attorney for the city of Baltimore, Md., reports more disturbing statistics. Mr. Moylan said:

> * * * [W]e used to get * * * (confessions) in 20 to 25 percent of our cases, and now we are getting * * * (them) in 2 per cent of our cases. The confession as a law-enforcement instrument has been virtually eliminated (hearings, p. 622).

Mr. Moylan noted that the *Miranda* case has encouraged criminals, discouraged the police, and disappointed the public that depends on the courts for protection.

Frank S. Hogan, New York County district attorney, reported similar findings. In the 6 months prior to the *Miranda* case, 49 percent of the nonhomicide felony defendants in New York County made incriminating statements. In the 6 months after the decision, only 15 percent of the defendants gave incriminating statements. Mr. Hogan characterized it as being most harmful to efforts to convict criminals who roam our streets and assault our citizens.

Committee Report, P. L. 90-351, Title II, 1968 U. S. Code and Adm. News, pp. 212-29. Congress concluded that continued adherence to the rigid requirements of the *Miranda* decision is unwise as a matter of policy, and not required by the United States Constitution (Id. at pp. 2132-38):

> The committee is convinced from the mass of evidence heard by the subcommittee, much of which is printed in the transcript of hearings, that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement. Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt. The transcript and subcommittee files contain testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country, demonstrating beyond doubt the devastating effect upon the rights of society of the *Miranda* decision. The unsoundness of the majority opinion was forcefully shown by the four dissenting justices, who also predicted the dire consequences of overruling what theretofore had been the law of the land, confirmed in 1896 in *Wilson v. U. S.*, 16 S. Ct. 895, 162 U. S. 613, and in 1912 in *Powers v. U. S.*, 32 S. Ct. 281, 223 U. S. 303, and in other more recent Supreme Court decisions.
>
> The Supreme Court itself suggests that Congress is free to enact legislation in this field. The Court's invitation for Congress to act could stem from a widespread notion that Congress is better able to cope with the problem of confessions than is the Court. Senator Bible, in testifying before the subcommittee, observed that experience has taught that Court decisions are too inexact to deal with postarrest problems. The Honorable J. Edward Lumbard, Chief Judge of the U. S. Court of Appeals for the Second Circuit agrees. He states:

In my opinion, it is most important that the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.

Judges seldom have before them all those who are the best informed regarding practical problems and the difficulties in living with any proposed change in the law. Judges usually are advised only by the parties in the case; the parties want to win the case and do not always care about general principles of wider application.

As I said before, it is because the Congress and the legislatures of the States have taken so little action in the field of criminal justice that the courts have more and more chosen to lay down rules which have the force of law until changed, and which all too frequently come to us in the form of new constitutional principles which then can be modified only by constitutional amendment (hearings, p. 184).

Mr. Specter expresses a similar view. He pointed out that the subcommittee hearings make it possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions. The courts, in considering only the limited facts and issues of each particular case do not have the opportunity to evaluate all these factors. Passage of this bill with all of its legislative history—

the record of the subcommittee hearings and all of the underlying social policies bearing on this issue and taken into account by Congress—will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices. . . .

The committee is of the view that the legislation proposed in section 701 of title II would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors. There is the added safeguard that the jury must be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted only after passing the tests of both court and jury under the above-described safeguards. The committee also feels that a civilized society could not be more fair to persons accused of crime, as the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation.

The committee is aware that a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in the majority opinion in *Miranda*. The committee, however, is aware also that the overwhelming weight of the testimony adduced by the subcommittee supported the passage of these provisions of the bill, and that the vast

majority of the witnesses expressed no doubt as to the constitutionality of the legislation. The committee is also aware that the opinions of the four dissenting Justices clearly indicate that neither of them would consider these provisions unconstitutional. Justice Harlan, it will be recalled, said the majority opinion "represents poor constitutional law," and that "it would be shared by few."

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices (excerpts from which are heretofore quoted in this report) that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.

After some delay in determining the constitutionality of the portions of the Omnibus Crime Control Act which limited the literal application of *Miranda,* Attorney General John N. Mitchell concluded that the new act was constitutional and that it should be used. Accordingly, a memorandum was sent to all of the United States attorneys throughout the country on June 11, 1969, and the full text released by the Attorney General (5 Cr. L. 2350-52 (footnotes in original):

DEPARTMENT OF JUSTICE
Washington, D. C. 20530
June 11, 1969

TO: UNITED STATES ATTORNEYS

SUBJECT: Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

The attached memorandum sets forth the Department's position in respect to implementing Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (concerning the admissibility of confessions and eye-witness testimony in federal criminal prosecutions). All cases presenting problems under *Miranda* or *Wade* should be examined in light of the arguments suggested by the memorandum. Those arguments, in brief, are as follows:

Section 3501—Under this section, the failure to give all aspects of the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession; Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege against compelled self-incrimination itself has been violated, not where a particular protective safeguard has been violated without affecting the privilege itself.

Section 3502—Under this section, the positive testimony by a witness that he saw the accused commit the crime will suffice, for the purpose of admitting his identifying testimony at trial, to show that the basis of his ability to identify the accused is independent of any observation of a lineup at which the accused was not accorded the right to the presence of counsel.

In enacting Title II, Congress was, in effect, expressing its concern with the inflexible results of the *Miranda* and *Wade* decisions, and seeking to induce a judicial reexamination of the underlying bases for those holdings. The interpretation of Title II expressed in the attached memorandum attempts to avoid

a direct conflict between the legislation and the constitutional requirements of *Miranda* and *Wade*, and yet to achieve the benefit to law enforcement intended by Congress. The arguments outlined, if adopted by the courts, could salvage some cases which otherwise might be lost. As emphasized in the memorandum, however, the arguments presuppose the necessity of continuing to have federal agents give the *Miranda* warnings before interrogations, and afford an opportunity for the presence of counsel at lineups, as matters of standard practice.

WILL WILSON
Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington, D. C. 20530
Memorandum

SUBJECT: Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) contains provisions relating to the admissibility of confessions in federal criminal prosecutions which differ from the rules regarding such admissibility as announced by the Supreme Court in *Miranda v. Arizona*, 384 U. S. 436, and further contains a provision relating to the admissibility of eyewitness testimony which does not expressly set forth the limitations upon such admissibility as announced by the Court in *United States v. Wade*, 388 U. S. 218, and *Stovall v. Denno*, 388 U. S. 293. This memorandum sets forth the Department's position with respect to interpreting and relying upon provisions of Title II in cases tried subsequent to June 19, 1968, the effective date of the Act.

Section 3501 and Miranda

. . . The area where we believe the statute can be effective and where a legitimate constitutional argument can be made is the situation where a voluntary

confession is obtained after a less than perfect warning or a less than conclusive waiver, as, for example, where an agent inadvertently fails to fully explain the right to have counsel appointed for an indigent, or a written waiver is not obtained. The admissibility of the confession may be urged in an argument framed along the following lines:

In *Miranda v. Arizona*, 384 U. S. 439, the Supreme Court stated that confessions by persons accused of crime were "a proper element in law enforcement" and that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U. S. at 478. The Court found, however, that persons in police custody are, by virtue of that custody alone, subject to a form of "compulsion inherent in custodial surroundings." *Id.*, at 458; see *id.*, at 465, 467, 478. In order to dispel this inherent compulsion and thus to safeguard the individual's Fifth Amendment right "to remain silent unless he chooses to speak in the unfettered exercise of his own will" (*id.*, at 460), the Court held that accused persons must be made aware of their "right of silence" and assured a "continuous opportunity to exercise it." *Id.*, at 444; see *id.*, at 467, 479, 490.

The Court stated that it "cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process" (*id.*, at 467), as long as any solution devised is "effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" (*ibid.*). Various solutions, the Court noted, "might be devised by Congress or the States in the exercise of their creative rule-making capacities" (*ibid.*). However, the Court stated, until such "potential alternatives for protecting the privilege" are devised by Congress and the States (*ibid.*), a person must be warned prior to any in-custody questioning that he has a right to remain silent, that any-

thing he says can be used against him in court, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning (*id.*, at 444, 479). The warnings are thus "procedural safeguards." *Id.*, at 444, 478; see *id.*, at 467.

The core of the *Miranda* decision is that, in order for a statement by an accused who has been questioned in police custody to be considered free from any form of compelling influence, it must have been made with the understanding on the part of the accused that he did not have to speak at all. The specific warnings enunciated by the decision constitute a means, suggested by the Court, by which the accused's Fifth Amendment privilege may be safeguarded in the custodial situation. It was *some* "system" to safeguard against inherently compulsive circumstances which the Court found necessary under the Constitution; it did not find a *particular* system necessary. The effect of the statute, in our view, is to instruct the courts that exact compliance with *Miranda* is not the only means by which the requirements of the privilege can be said to have been met. Section 3501(b) directs district court judges to look to "all the circumstances surrounding the giving of the confession" in determining whether a breach of a protective measure resulted in an actual breach of the privilege itself. If it did not, the confession is admissible even if a particular aspect of the *Miranda* warnings was not fully complied with. Since those specific warnings are not themselves constitutional absolutes, the determination by Congress—that their absence in a case should not entail an inflexible imposition of the exclusionary rule—is within the power of Congress. The Court stated in *Miranda* that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." 384 U. S. at 491. Clearly the Court was referring to the privilege, not the delineated

means of protecting it. In the same paragraph, the Court emphasized that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation." *Id.*, at 490; see *id.*, at 467.

In short, while the Court in *Miranda* tried to set forth a set of rules which would avoid the necessity of considering all the circumstances of a particular case,* Congress has, in effect, told the courts that it does want the cases considered on an individualized basis. "The rigid, mechanical exclusion of an otherwise voluntary and competent confession," the Senate Committee on the Judiciary stated, "is a very high price to pay for a 'constable's blunder.'" S. Rep. No. 1097, 90th Cong., 2d Sess. 38 (1968). The statute, however, clearly recognizes that a statement must be voluntary in the sense that it must not only be free of physical coercion, but must be made with awareness of the individual's Fifth Amendment rights; the statute does not abrogate constitutional rights. Congress has reasonably directed that an inflexible exclusionary rule

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* It was in this context that the Court characterized the expedient of giving "a warning as to the availability of the privilege" as so simple that it would not "pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." **Id.**, at 468. The "system," the Court felt, should require giving this warning even to a person who might be presumed to know of the right. It was this aspect of the **Miranda** holding—that even a lawyer would have to be warned under this system—that apparently prompted the Senate sponsors to specify as a factor in the district court's assessment of voluntariness under 3501(b) "whether or not such a defendant was advised **or knew** that he was not required to make any statement" (emphasis added). See **e.g.**, 114 Cong. Rec. S. 5007 (daily ed., May 6, 1968). While this does not change the necessity of giving this warning even to a lawyer under the "system" currently in effect, it does indicate that the reason for the phrase "or knew" is the conclusion by Congress that **obvious** knowledge is logically equatable with a warning in this situation. In light of this background, and in light of the overall import of the entire section, this phrase cannot properly be read as indicating that a district court could find a statement free from inherently compulsory influences when elicited from a person who was in fact totally unaware that he need not make a statement.

be applied only where the constitutional privilege itself has been violated, but not where a protective safeguard system suggested by the Court has been violated in a particular case without affecting the privilege itself. The determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power.**

That is not to suggest that this Court is without the power to state appropriate constitutional standards for the taking of confessions as for all other questions in which the Pennsylvania state courts are called upon to decide such questions. But the Pennsylvania courts are certainly not bound to accept blindly a series of requirements laid down by the United States Supreme Court before the passage of the Omnibus Crime Control and Safe Streets Act and thereafter repudiated by a co-equal branch of the Federal Government in that Act. In this respect it should be remembered that the *Miranda* warnings made it clear that there was nothing sacred in the specific rules which it articulated but, rather, that those warnings or other equivalent protections must be guaranteed to defendant. It is in this context that this Court is requested to repudiate a doctrinaire legal interpretation of *Miranda* in favor of a more flexible approach, as outlined in the Omnibus Crime Control Act.

** The English practice is comparable. Although a warning is required under the Judges' Rules, a failure to give the warning in a particular case will not necessarily result in exclusion from evidence of a resulting statement; the matter lies within the discretion of the court. See Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1091, 1093-1094 (1966).